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November 14, 2012

Acting Chief Cory Moles
Escondido Police Department
1163 North Centre City Parkway
Escondido, CA 92026

Re: Non-fatal shooting of Mr. Michael Joshua Flores on October 29, 2011, by Escondido Police Officer Russell Gay; Escondido Police Department Case No. 11-13963; DA Special Operations Case No. 11-099PS; Deputy District Attorney assigned: Annette H. Irving

Dear Acting Chief Moles:

We have reviewed the reports and materials compiled by your department's Crimes of Violence Unit concerning the non-fatal shooting of Mr. Michael Flores by Officer Russell Gay on October 29, 2011. A District Attorney Investigator responded to the scene and was briefed by your investigators. The investigation was presented to our office for review on July 16, 2012.

Persons Involved

At the time of the incident, Mr. Michael Flores was 27 years old and driving a 2007 Chevy Aveo.

Escondido Police Officer Russell Gay was in full uniform, assigned to patrol duties and operating a marked Escondido patrol car.

Background

Shortly after 10:00 p.m., on October 29, 2011, Ms. Garcia called the Escondido Police Department reporting that her ex-boyfriend, Mr. Flores, in violation of a temporary restraining order, had entered her apartment and was refusing to leave. Ms. Garcia fled her apartment with her cell phone and called police. She saw Mr. Flores steal her Chevy Aveo and drive two blocks away to the Go-Mart liquor store where he parked in front of the store. Ms. Garcia told the dispatcher, *"He's not supposed to be here. He's taking my car... He just stole my car... He pulled into the liquor store."*

Shooting Incident

Officer Russell Gay was assigned to Ms. Garcia's call for help. When Officer Gay arrived, Ms. Garcia flagged him down and pointed out where Mr. Flores had parked her car. Officer Gay drove to the liquor store, parked his patrol car behind the stolen Chevy and activated his

overhead emergency red and blue lights. Mr. Flores was sitting in the driver's seat of the Chevy with the engine off and the driver's window down as Officer Gay approached on foot. While standing next to the driver's door of the Chevy, Officer Gay told Mr. Flores he was investigating the theft of the car and to hand over the keys.

When Mr. Flores failed to surrender the keys and it appeared to the officer that Mr. Flores was going to start the car and flee, Officer Gay deployed pepper spray; however, Mr. Flores started the car, shifted into reverse, backed up and rammed into Officer Gay's patrol car. In order to avoid being struck by the Chevy, Officer Gay was forced to move quickly out of the path of the Chevy as the front end of the car swung around to the left. Officer Gay ran to the front sidewalk of the liquor store trying to get to an area of safety. When Mr. Flores shifted the Chevy into drive and accelerated forward toward Officer Gay, the officer drew his sidearm and fired eight shots at Mr. Flores. Mr. Flores was struck in the arms, chest and left eye by the gunfire. Mr. Flores was transported to Palomar Hospital where he was treated for his wounds before being transferred and booked into County Jail.

Investigation

The crime scene was secured and an investigation conducted. The investigation revealed Officer Gay fired eight times. Eight expended .40 caliber shell casings were recovered at the scene. All the shell casings were located in areas consistent with Officer Gay's stated firing position. Six of the shots struck and penetrated the Chevy's windshield. The Chevy sustained minor damage to its rear bumper from the impact with the patrol car. Portions of this incident were captured on the liquor store's video camera. The video, along with Ms. Garcia's 911 call and the police radio transmissions were reviewed in detail. They memorialize the incident and corroborate the officer's and the witnesses' accounts of the incident. The police radio transmissions revealed after Mr. Flores backed into the patrol car, that Officer Gay radioed, ***"Code Cover he just hit my car."*** Ten seconds later Officer Gay radioed, ***"Shots fired, Code Three."*** Toxicological tests revealed Mr. Flores had a blood alcohol level of .13%. The court order restraining Mr. Flores from having any contact with Ms. Garcia was issued on December 29, 2010 and was valid through December 29, 2013.

Witness Statements

Several civilians present saw Mr. Flores park the Chevy in front of the liquor store. They also saw Officer Gay arrive and park his patrol car behind the Chevy, speaking to Mr. Flores at the driver's door and shining his flashlight into the car. The witnesses saw Mr. Flores start his car, shift it into reverse while maneuvering the car and accelerate backwards and run into the patrol vehicle. The witnesses also saw Officer Gay trying to avoid being struck by the Chevy as the car advanced forward toward him and then firing at Mr. Flores as Flores continued to approach.

Officer Gay's Statement

Officer Gay provided investigators with a voluntary and recorded statement. Officer Gay said when he first contacted Mr. Flores that Flores appeared nervous. Officer Gay said he detected the odor of an alcoholic beverage and marijuana coming from inside the car, asked Mr. Flores if he was supposed to have the car and told Flores to give him the keys. Officer Gay said he told

Mr. Flores he was going to pepper spray him if he didn't comply, and then did so when Flores didn't hand over the keys. Officer Gay feared he might be run over and began backing away from the car when he saw Mr. Flores start the engine and turn the wheel. Officer Gay saw Mr. Flores accelerate the car in reverse as the front end swung around toward where Officer Gay was standing. Officer Gay saw Mr. Flores back into his patrol car, shift into drive, and then accelerate forward toward where Officer Gay had ran to on the sidewalk in front of the liquor store. As the car accelerated forward, Officer Gay feared he was going to be struck and pinned between the car and the front of the building. Officer Gay said he fired because he feared Mr. Flores was going to run him over or one of the other civilians who were also present outside the store.

Mr. Flores' Statement

Mr. Flores waived his Miranda rights and provided investigators with a voluntary and recorded statement. He admitted he'd been served with a Restraining Order which required him to stay away from Ms. Garcia; however, Mr. Flores claimed he and his ex-girlfriend were living together and that he had her permission to take her car. He admitted drinking two Vodka sodas earlier that night. He said a police officer told him to move the car and give him the keys, but he didn't know a police car was parked behind him, never saw the car's red and blue lights and didn't remember the officer spraying him with pepper spray. Mr. Flores said when he backed up the officer just started shooting at him. Mr. Flores said his car was travelling at about 20 mph when he backed into a police car that he didn't know was there. Mr. Flores denied driving forward toward the officer and said the officer was shooting at him while he was backing up.

Criminal Filing

On November 2, 2011, the District Attorney's Officer charged Mr. Flores with two felony counts: Assault with a Deadly Weapon on a Peace Officer and Auto Theft. He was also charged with six misdemeanor counts which included Violating a Protective Order, Violation of a Court Order, Theft, Driving while Intoxicated, and Resisting Arrest. On September 4, 2012, Mr. Flores pled guilty to Assault with a Deadly Weapon on a Peace Officer, Auto Theft, Violating a Protective Order, Violation of a Court Order, Theft, and Driving while Intoxicated. Sentencing is scheduled to take place on December 11, 2012.

Legal Analysis

This review was conducted pursuant to the joint protocol between this office and all San Diego law enforcement agencies calling upon the District Attorney to conduct an independent assessment of the circumstances surrounding the use of deadly force. The review does not examine such issues as compliance with the policies and procedures of any law enforcement agency, ways to improve training or tactics, or any issues related to civil liability. Accordingly, such a review should not be interpreted as expressing an opinion on these matters.

Under California law, peace officers may use deadly force to protect themselves from the threat of death or great bodily harm and to use reasonable force in making an arrest.

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Conclusions


In this case, uniformed Escondido Police Officer Russell Gay was in the process of investigating Mr. Flores' involvement in several crimes. When Mr. Flores refused to comply with Officer Gay's commands, he backed into Officer Gay's patrol car and then accelerated forward toward Officer Gay. The officer responded by drawing his sidearm and firing at Mr. Flores.

Based on our review of these events, it is apparent that Officer Gay fired at Mr. Flores in self-defense. His use of deadly force under these circumstances was reasonable and he therefore bears no criminal liability for his actions.

A copy of this letter along with the materials submitted for our review will be retained in our files.

Sincerely,

BONNIE M. DUMANIS
District Attorney
County of San Diego

By: 
Annette H. Irving
Deputy District Attorney
Special Operations Division

AHI:vf
cc: Captain Benton